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No. 85-2022

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

and

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONERS' REPLY MEMORANDUM

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In the Memorandum of the Federal Energy Regulatory Commission in Opposition to the Petition for a Writ of Certiorari, the Respondent Federal Energy Regulatory Commission ("Commission") asserts that "it is beyond dispute, and the Commission so found, that individual pipelines benefit from the processing of their rate change applications." Memorandum in Opposition at 5. The Commission's *ipse dixit*, however, is far from being beyond dispute and the Commission's mere "finding" that pipelines benefit from processing their rate changes does not make it so, but rather rests on a strange notion of what constitutes a benefit as well as a fallacious analysis of the Independent Offices Appropriation Act ("IOAA"), 31 U.S.C. § 9701.

Stripped of its veneer, the Commission's current determination that fees for rate case filings are permitted under the IOAA is tantamount to a claim that members of a regulated industry receive a "special benefit" whenever the regulated company is required to take an action to comply with the law and the agency monitors compliance therewith. The "special benefit" standard thus effectuated is essentially limitless; moreover, it is divorced utterly from the public interest considerations that motivated passage of the Natural Gas Act ("NGA"), the Act from which the Commission derives authority to regulate the rates of interstate natural gas pipeline companies.

The Commission and the court below failed to come to grips with the fact that rate regulation under the NGA was instituted solely to protect the public (*see* Section 1 of the NGA, 15 U.S.C. § 717(a)) and this public benefit feature of the Act may not be read out of the statute to serve some other perceived expedient. The legislative history of the NGA is replete with examples of the behavior the NGA was intended to control. Against this unequivocal legislative history and when the purpose of the Act is declared to be the protection of the consuming public, it is nonsensical to suggest that this interest is merely incidental and that, consequently, it may be disregarded in order to impose on pipelines the entire cost of regulation.

The Commission contends (Commission Memorandum in Opposition at 5, n.2) that it is entitled to change its mind from its determination in 1965 that it had no authority to impose fees for rate change filings "especially where, as here, intervening court decisions have clarified the IOAA." While we agree that this Commission and other similar regulatory bodies may and occasionally do change their minds on policy matters, the Commission may not change its mind on matters of law absent a change in the law or court interpretations of the law. Since 1965, the only cases decided by *this* Court interpret-

ing the IOAA are *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974) and *FPC v. New England Power Co.*, 415 U.S. 345 (1974) and these cases are in direct conflict with the Commission's current determination, as affirmed by the court below. Further, none of the subsequent court of appeals decisions cited by the Commission in its memorandum in opposition purports to disagree with or distinguish *National Cable* and *New England Power* and none purport to condone fees for rate changes for regulated pipelines or electric utilities.[1]

The Commission contends (Memorandum in Opposition at 4) that its view of the IOAA finds support in the language of the IOAA itself. The present statutory language, however, is a recodification, not an amendment, of 31 U.S.C. § 483(a), the 1951 version of the statute. Section 483(a) listed specific things of value for which fees could be charged and specified in a catchall provision that fees could be charged for other *similar* things of value. The statute does not say, nor does it even begin to suggest, that imposing restrictions on a pipeline's ability to increase its revenues and earnings constitutes a "thing of value" to the regulated pipeline. It defies the plain and ordinary meaning of the statutory language as well as commonsense to impose on the statute the construction that the Commission has advanced in the Orders at issue here.

Finally, it is ironic that the Commission chooses the current economic climate to claim that restraints upon

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[1] The Commission's reference to this Court's observation in *New England Power* that a rule on accounting practices would provide the basis for imposing a fee "if the industry derives a benefit" (Memorandum in Opposition, p. 4) is a red herring. We are not here contesting a fee for reports on accounting practices and the Commission does not impose such a fee. Even so, the Court only held that there must be a demonstration of a benefit to the industry and the Commission has not made that showing, either with rate regulation or, if they chose to impose fees upon them, accounting reports.

the ability of pipelines to increase prices constitute a benefit to the pipelines. Virtually all other industries, including natural gas producers, have been freed of federal regulation and only the marketplace governs the prices which the individual members of those deregulated industries may charge. Yet, natural gas pipelines remain restrained by regulation to the "lowest reasonable rates" permitted by the Federal Energy Regulatory Commission and the Commission claims that these restraints benefit the industry. To the contrary, Congress placed limits on the type of activities for which fees could be charged. It did not intend, and the language of the IOAA does not now permit, an agency to bootstrap its authority to regulate an industry into authority to impose fees for any activity which the agency undertakes.

Respectfully submitted,

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